

the kind of interconnection arrangement that is most favorable to the end user. The Order violates federal law.

2. The Order improperly relates CMRS service to the wireline network.

CMRS carrier's rights do not depend on any relationship to the wireline network.⁷² Wireline rules cannot be blindly applied to CMRS service. The Order wrongly applies wireline concepts to ASAP's mobile, paging service when it concludes that CenturyTel can impose retail toll charges on its end users who call ASAP's paging customers who are not (or are deemed to not be) within the ELCS area. We are addressing mobile service. Being mobile – and occasionally outside of a wireline local calling area – is not a crime that is punishable by a toll.

3. The Order eliminates ASAP's right to Type 2 interconnection.

There are three general CMRS interconnection types:

105. LECs are currently obligated to provide three basic types of interconnection to CMRS providers. Type 1 service involves interconnection to a telephone company end office similar to that provided by a local exchange carrier to a private branch exchange (PBX). Type 1 interconnection involves an end office connection that combines features of line-side and trunk-side connections and uses trunk-side signaling protocols. Type 1 interconnections enable the CMRS provider to access any working telephone number, including all NXX codes within the LATA of the LEC providing the interconnection. The Type 1 connection also permits access to Directory Assistance, N11 codes, and service access codes. Type 2A connections give the CMRS carrier the ability to connect to the Public Switched Network in the same manner as any wireline carrier. The connections, which may be either solely to access tandems or to a combination of tandems and other central offices, are true trunk-side connections using trunk-side signaling protocols. Type 2A connections do not permit access to LEC operator services or N11 codes. Type 2B connections are trunk-side connections to an end office that operate in the same manner as high-usage trunks. Under Type 2B interconnection, the CMRS provider's primary traffic route is the Type 2B connection, with any overflow traffic routed through a Type 2A connection. Type 2B interconnection permits access to valid NXX codes, but cannot access operator services or N11 codes.⁷³

⁷² *In Re Cost-Based Terminating Compensation for CMRS Providers*, CC Docket Nos. 95-185 and 96-98, and WT Docket No. 97-207, DA 01-1201 (May 9, 2001); *In the Matter of Developing a Unified Intercarrier Compensation Regime, Intercarrier Compensation for ISP-Bound Traffic, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 01-92, Notice of Proposed Rulemaking, FCC 01-132 ¶¶ 104 (Rel. Apr. 27, 2001) ("*Intercarrier Compensation NPRM*"). These cases involved intercarrier compensation, but this concept is validly applied: one cannot impose wire line rules (such as the assumption there is an access line and a customer premise) to wireless service.

⁷³ *See, e.g., In the Matter of Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services*, ¶ 105 FCC 94-145, CC Docket No. 94-54, RM-8012, 9 FCC Rcd 5408, 1994 FCC LEXIS 3181 (Rel. Jul. 1, 1994). ("*CMRS Equal Access Obligations*"). The FCC has used these definitions any number of times, including in the 1986 Policy Statement.

CMRS carriers have the right to choose between Type 1 and Type 2 and the ILEC cannot dictate the form of interconnection, especially the choice between Type 1 and Type 2.⁷⁴ ASAP has exercised its right to choose Type 2. This Type 2 interconnection – in combination with ASAP's NANPA issued NXXs in twelve rate centers within the Austin LATA – must allow ASAP's customers to be reachable on a local basis from any calling party located within the mandatory local calling area of ASAP's NXX.⁷⁵

The Order, however, converts every one of ASAP's 13 Austin LATA NXXs into Austin NXXs. It denies access to the end offices and tandems that connect to SBC's Greenwood and Homestead tandems within the Austin LATA, unless the calling party pays a toll.

The Order denies ASAP the choice of Type 1 or Type 2 interconnection. It makes Type 2 interconnection unworkable by requiring ASAP to have 12 switches or paging terminals that subtend SBC's Austin tandems. It functionally requires ASAP to move to Type 1 interconnection because if ASAP were to use Type 1 it would get local retail rating for calls to the Type 1 number regardless of the physical location of its CMRS customer, and regardless of the rate center in which ASAP had its paging terminal.⁷⁶ This exposes yet another anticompetitive and discriminatory result of CenturyTel's position and the Order's recommended conclusions.

When a CMRS carrier's uses Type 1 interconnection, the CMRS carrier's "number" resides in an ILEC switch, and not the CMRS switch.⁷⁷ Since the number resides in the ILEC switch, calls to that number from any calling party within the local calling area, including an ELCS area will be retail rated as local. This will be the case regardless of the physical location of the called party, or whether the called party is a "customer who carries a pager" or an ISP. There is something wrong with this. If the number resides in the ILEC switch, it is local regardless of called party location, but if the

⁷⁴ 1986 Policy Statement *supra*; Memorandum Opinion and Order, *In the Matter of William G. Bowles Jr. P.E. d/b/a Mid Missouri Mobifone, Complainant, v United Telephone Company of Missouri*, DA 97-1441, File No. E96-04 (Rel July 1997); *The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, Memorandum Opinion and Order on Reconsideration, 4 FCC Rcd 2369 at 2376 (1989): ("We deny BellSouth's and Ameritech's requests to reconsider or clarify the application of our Type 2 reasonable interconnection and six-month policies to RCCs. First, we agree with the RCC oppositions that paging carriers' requests for Type 2A interconnection are not inherently unreasonable, contrary to the assertions of BellSouth. We emphasize that, like a cellular system, a paging carrier is entitled to choose the most efficient form of interconnection for its network, and the BOCs may not dictate an RCC's type of interconnection.").

⁷⁵ Type 2 interconnection at a tandem allows a CMRS carrier to receive calls from any end office that "subtends" the tandem, and from any other tandem (and its end offices) that are connected to the Type 2 tandem. *CMRS Equal Access Obligations, supra* at ¶ 105. CenturyTel's San Marcos end office/tandem is connected to SWBT's Greenwood tandem, so ASAP should be able to receive calls from San Marcos via its Type 2 interconnection. See also, Hng Tr. pp. 220-21.

⁷⁶ That is, unless the Commission intended to overrule both the FCC's Type 1 and Type 2 rules in Texas.

⁷⁷ Recall that with Type 1, the CMRS carrier switch looks like a PBX, and not a Class 5 switch. The NXX resides in the ILEC's end office switch, not the CMRS carrier's "PBX."

number resides in a competitive carrier switch the called party's location matters. This is discrimination run riot. The Order unlawfully denies ASAP its interconnection rights under federal law.

Rehearing No. 4: The Order erred in finding that CenturyTel did not violate its General Exchange Tariff.

Order pages 1-3; Findings of Fact Nos. 12-51A; Conclusions of Law Nos. 18-39; Ordering Paragraphs 1-3, 5.

ASAP has shown above that ILEC-provided ELCS and mandatory EAS are basic service once the area is expanded. The geographic tests are merely the means by which petitioning customers can obtain an expanded basic calling scope. After the statutory test is met, an "ELCS" or mandatory EAS area becomes the mandatory local calling scope, and *is* local service. Finally, as shown above, calls from ILEC customers to customers of alternative carriers that use an NXX associated with any rate center within the ELCS or mandatory EAS area are local calls for retail rating purposes.

In a case that addressed many similar issues to those in this Docket, CenturyTel's Michigan affiliate imposed toll charges on one of its users who used an ISP that received service from a CLEC. The ISP used a number issued to the CLEC that was associated with a rate center that was "extended area service" (and therefore "local") to the CenturyTel exchange. When the customer complained, CenturyTel made many of the same excuses. The Michigan PSC rejected each excuse. It found that EAS was not limited to ILECs; an interconnection agreement was not required to grant relief; the ISP's "location" was irrelevant because the NXXs were determinative of rating; routing does not determine rating; CenturyTel violated its tariff; CenturyTel engaged in unreasonable discrimination against the CLEC; and CenturyTel violated dialing parity. CenturyTel was fined \$500 per day of violation.⁷⁸ The same principles apply to this case. The tariff speaks in terms of calls to "exchanges" and does not have any exception for calls to customers of non-ILECs or carriers with whom CenturyTel does not have an agreement. The location of the called party is not determinative for purposes of retail rating. CenturyTel violated its tariff.

Even if ASAP is wrong concerning ELCS/mandatory EAS in general, then CenturyTel's tariff still requires it to retail rate calls to ASAP's Kyle, Fentress and Lockhart NXXs as local. The Order wrongly assumes or concludes that the general rule relating to ELCS espoused in the Order applies

⁷⁸ *In the Matter of the Complaint of Glenda Bierman Against CenturyTel of Michigan, Inc., d/b/a CenturyTel*, Case No U-11821, Michigan PSC, 1999 Mich. PSC LEXIS 118 April 12, 1999.

when one considers what CenturyTel's tariff actually says. The ELCS tariff does not address areas; it refers to "exchanges."⁷⁹ An "exchange" in this sense is the NXX, along with its rate center assignment.

The PUC Staff opined that ASAP's traffic was not "eligible" for ELCS, but CenturyTel was still prevented from imposing toll on its end users as a result of CenturyTel's tariff.⁸⁰ Therefore, under Staff's theory, regardless of whether calls to ASAP's customers are "ELCS" CenturyTel cannot impose toll on its end users unless and until it amends its tariff. Staff was right in this respect.⁸¹

CenturyTel represented to its users that calls from its San Marcos customers to ASAP's customers that used an ASAP Lockhart number went to "Lockhart."⁸² Although CenturyTel now asserts that the calls did not in fact go to "Lockhart" this assertion is quite inconsistent with its representation to its own users. CenturyTel cannot have it both ways. Either the calls went to a Lockhart exchange, or they did not. ASAP's Lockhart NXX is a "Lockhart exchange code." The calls did go to a Lockhart exchange and CenturyTel represented the same thing to its users. CenturyTel did violate its tariff.

Rehearing No. 5: The Order wrongly concludes that CenturyTel's actions were not anticompetitive in violation of PURA § 52.108(3).

Order pages 1-3; Findings of Fact Nos. 12-51A; Conclusions of Law Nos. 18-39; Ordering Paragraphs 1-3, 5.

The Order concludes that CenturyTel's actions were not anticompetitive because the calls in issue are not local. It therefore did not address whether CenturyTel acted anticompetitively if the calls are local. Once the Commission corrects the Order's error on retail rating, it must then find that CenturyTel violated § 52.108(3).

CenturyTel is attempting to charge its users a toll when they call users of a competitor. Yet when a CenturyTel user calls a SWBT or Verizon user (including a SWBT or Verizon FX user that is physically outside the ELCS area), CenturyTel does not impose a toll.

⁷⁹ Excerpts from CenturyTel's tariff are in the record as Exhibit 3 to ASAP Exh. 9 (Gaetjen Dir.). One must review both the terms for local service and those for long distance. Any fair reading of both tariff terms leads to the conclusion that CenturyTel cannot impose toll on its end users for calls to ASAP's Kyle, Fentress and Lockhart NXXs.

⁸⁰ Staff Initial Brief, p. 4

⁸¹ If ASAP places a switch in Kyle, Fentress and/or Lockhart, then even under the Order the calls will be deemed to "terminate" in those exchanges. See Conclusion of Law No. 30. Any refusal to retail rate calls under such circumstances would even more clearly violate the tariff.

⁸² ASAP Exh. 9 (Gaetjen Direct) Exhibit 4. If nothing else this representation proves ASAP's point that the industry – including CenturyTel – uses the BIRRDS rate center designation of the terminating NXX to determine "where" a call goes. CenturyTel, however, overruled the LERG and BIRRDS to rate the calls in issue as toll. This took manual intervention.

CenturyTel competes with ASAP on several levels. CenturyTel provides service to ISPs that is different than, but competes with ASAP's services.⁸³ CenturyTel (or an affiliate) provides Internet access, in competition with ASAP⁸⁴ and ASAP's ISP customers, so it has the incentive to raise the cost to those ISPs by imposing higher costs on ASAP. CenturyTel (or an affiliate) provided paging service, at least at the time of the hearing on interim relief.⁸⁵ The actions CenturyTel took, and the positions it is advancing, are anticompetitive since they would seriously hinder, if not completely prevent, the competitive alternatives made available by ASAP and the ISP users of its numbers. San Marcos callers will not call ASAP or users of ASAP's numbers that are local to San Marcos if they must pay toll.⁸⁶

PURA § 53.003(c) prevents CenturyTel from granting unreasonable preferences to or unreasonably discriminating against any of its end use customers. It also cannot have or maintain unreasonable differences in rates between localities. Similarly, § 55.005 prohibits CenturyTel from granting unreasonable preferences to any end user or subjecting any end user to an unreasonable prejudice or disadvantage. In this case, CenturyTel seeks to impose toll charges on its users that call ASAP's customers with Kyle, Fentress and Lockhart numbers, but it does not do so when its users call customers with Verizon's Kyle or Fentress numbers or SWBT's Lockhart numbers, including FX customers that are not physically within the ELCS area. This difference in treatment based on the identity of the called party or the called party's service provider clearly violates both §§ 53.003 and 55.005, and therefore requires the Commission to enter an order prohibiting the unlawful practices under § 52.108.

Similarly, § 55.006 prohibits CenturyTel from discriminating against ASAP or engaging in any practice that restricts or impairs ASAP's ability to compete. Again, the practice of imposing toll on CenturyTel end users that call one of ASAP's Kyle, Fentress or Lockhart numbers even though CenturyTel does not impose a toll when its end user calls an ISP served by CenturyTel, a Verizon Kyle or Fentress number or a SWBT Lockhart number (including FX) discriminates against ASAP, and

⁸³ Hng. Tr. pp. 108-9.

⁸⁴ ASAP provides information services that compete with those provided by CenturyTel's ISP offerings. Int. Hng. Tr pp. 47, 155, ASAP Exh. 7.

⁸⁵ Int Hng. pp. 159, 207; ASAP Exh. 8

⁸⁶ The FCC recognized the importance of end users being able to place local, rather than toll, calls to ISPs, in analyzing, among other things, universal service issues. See, e.g., *Federal-State Joint Board on Universal Service, Report and Order*, 12 FCC Rcd 8776, 9142-43, 9159, 9160 (1997) ("*Universal Service Order*"), *Universal Service Report to Congress*, 13 FCC Rcd at 11541-42. The FCC also knows that paging companies need local numbers so that calling parties do not pay toll. Mr. Goldstein and Mr. Gaetjen both explained the need for local call rating ASAP Exh. 9 (Gaetjen Dir.) p. 13, ASAP Exh. 44 (Gaetjen Reb.) p. 7; Hng. Tr. p. 263.

absolutely restricts ASAP's ability to compete. ASAP will have considerable difficulty marketing the ability to have "local" call rating if those who call ASAP's numbers must pay toll. No one will buy the service because very few people will call the number.

Lack of dialing parity puts competing providers, their users and the ILEC users who call their users at a distinct disadvantage to the point that an ILEC which refuses to provide dialing parity also violates §§ 53.003, 55.005 and 55.006. This is the reason that the federal Act expressly requires local dialing parity.

CenturyTel certainly did act anticompetitively and it clearly did unreasonably discriminate against ASAP.

Rehearing No. 6: The Order improperly failed to rule that CenturyTel violated the local dialing parity rule (47 C.F.R. § 51.207). The Order allows a violation of the local dialing parity rule

Order pages 1-3; Findings of Fact Nos. 12-51A; Conclusions of Law Nos. 18-39; Ordering Paragraphs 1-3, 5.

The Order failed to address ASAP's contention that CenturyTel's action violated federal local dialing parity obligations. The Commission should have ruled that CenturyTel violated federal law.

47 U.S.C. § 153(15) defines "dialing parity":

The term 'dialing parity' means that a person that is not an affiliate of a local exchange carrier is able to provide telecommunications services in such a manner that customers have the ability to route automatically, without the use of any access code, their telecommunications to the telecommunications services provider of the customer's designation from among two or more telecommunications services providers (including such local exchange carrier).

The FCC promulgated its local dialing parity rules in 47 C.F.R. §§ 51.205 and 51.207. Section 51.205 addresses carrier rights to dialing parity, while § 51.207⁸⁷ addresses end users' right to dial the same number of digits to make a local call regardless of the called party's service provider. Unlike § 51.205, § 51.207 is not limited to carriers that provide telephone exchange or exchange access service. It grants end users the right to dial local calls on a 7-digit basis to service providers such as ASAP, even if they do not provide telephone exchange or exchange access service.⁸⁸ The Order allows CenturyTel to require 1+ dialing purely because of the identity of the called party's service provider,

⁸⁷ Sec. 51.207 Local dialing parity.

A LEC shall permit telephone exchange service customers within a local calling area to dial the same number of digits to make a local telephone call notwithstanding the identity of the customer's or the called party's telecommunications service provider

⁸⁸ It is clear from the FCC's rulings on dialing parity that once a carrier obtains an NXX associated with a rate center that is "local" to an ILEC customer, the ILEC cannot require additional digits – such as 1+ – to be dialed. The focus is obviously on the rate center assignments

and the fact that the called party is not deemed to be physically located within the mandatory calling area even when the called party is in the ELCS area. There are ILEC customers that are not located in the mandatory local calling area but will still be able to have 7 digit dialing within the ELCS area. This is not parity.

Requiring CenturyTel users to dial extra digits when they call an ASAP customer violates the federal dialing parity rules.

Rehearing No. 7: The Order incorrectly finds that the service ASAP provides ISPs is not "incidental" to ASAP's CMRS service.

Order pages 3-5; Findings of Fact Nos. 24-32; Conclusions of Law Nos. 6, 14-16; Ordering Paragraph 4.

The Order adopts the PFD recommendation on this point. The PFD correctly points out that there is no statutory or rule definition of "incidental" as that term is used in the FCC Rule that allows CMRS carriers to provide incidental services and which treats incidental services as CMRS. ASAP relied on a definition of "incidental" from Black's Law Dictionary⁸⁹ to demonstrate that providing service to ISPs was indeed "incidental" to its principal CMRS service. CenturyTel asserted that only services that actually use wireless spectrum can be incidental. The PFD and Order reject CenturyTel's extremely limited definition because, as ASAP pointed out, when a paging customer dials in to retrieve voice mail there is not any spectrum use. On the other hand, the Order adopts the PFD conclusion that an incidental service "must be one that is provided to the paging customers and directly supplemental to their paging service."⁹⁰ The FCC rule does not use "supplemental"; it uses "incidental." These are two different words with two different meanings. "Incidental" is a broader term than "supplemental."⁹¹ The Commission's use of "supplemental" to define "incidental" is incorrect and unlawful. These are two different words, and they are not synonyms.

This definition is too limited and incorrectly ignores the evidence concerning the extent to which ASAP's paging service is tied to, relies on and uses the Internet and ISPs. In order to provide its "principal" CMRS service, ASAP must be connected to the Internet and ISPs. The next step – providing PSTN connectivity to ISPs using the same switch and allowing them to use numbers within NXX blocks that would otherwise lie fallow – is direct, logical and ineluctably . . . incidental. ASAP's

⁸⁹ Black's Law Dictionary, Revised 5th Ed. (1979) defines "incidental" as "(d)epending upon or appertaining to something else as primary; something necessary, appertaining to, or depending upon another which is termed the principal, something incidental to the main purpose." Since ASAP depends on a connection to the Internet and to ISPs in order to provide its "principal" CMRS services, providing PSTN connectivity to ISPs is "incidental" to CMRS

⁹⁰ PFD, p. 16; Order p. 4

⁹¹ Black's Law Dictionary, Revised 5th Ed (1979) defines "Supplemental" as "(t)hat which is added to a thing to complete it."

paging customers can and do receive pages and other information that are launched from the Internet, and therefore ISPs.⁹² Mr. Gaetjen's un rebutted testimony was that "the Internet and paging service are intertwined and the joining will continue. They are related and complementary and at some point may wholly join."⁹³ ASAP's service to ISPs is incidental to its CMRS authority.⁹⁴

Rehearing No. 8: The Order erroneously finds that ASAP's service to ISPs requires PUC registration.

Order pages 3-5; Findings of Fact Nos. 24-32; Conclusions of Law Nos. 6, 14-16; Ordering Paragraph 4.

The Order correctly finds that the service ASAP provides to ISPs is not "basic local telecommunications service," "local exchange telephone service" or "switched access service" and that ASAP is therefore not required to obtain a CCN, COA or SPCOA. The Order, however, incorrectly concludes that ASAP must register as a nondominant carrier under PURA § 52.103. This conclusion is wrong because a state commission cannot assert regulatory authority over a purely interstate service. The FCC has exclusive jurisdiction; this is so even if the state's statutory and regulatory definitions facially cover ASAP's activities.⁹⁵ The Texas PUC cannot require an entity that provides only interstate services over a telephone system to subject itself to state regulation.

The FCC has absolutely and clearly held that ISP connections to the PSTN are part of an interstate service subject to the exclusive jurisdiction of the FCC.⁹⁶ While it is true that some of the Internet communications that travel over a switched or dedicated connection may ultimately originate and terminate in the same state, one cannot separate the two.⁹⁷ The reason is that once a connection to the ISP is made, it is not possible to segregate those parts of the Internet session that involve an end-to-

⁹² Hng. Tr. 25-6, 34-5, 56

⁹³ ASAP Exh 44 (Gaetjen Reb.) p 15.

⁹⁴ In *Federal Express Corp. v Cal PUC*, 936 F.2d 1075 (9th Cir. 1991), the appellate court held that Federal Express trucking operations were "part and parcel" (pun in original) of its air delivery system, and therefore not subject to state trucking regulation on account of the federal preemption in the Airline Deregulation Act of 1978 (then codified at 49 U.S.C. App. § 1305(a)(1) (1988)). The trucking operations were therefore "incidental" to the airline operations. As Mr. Gaetjen testified, both operations (CMRS and PSTN connectivity to ISPs) rely on use of and access to the Internet.

⁹⁵ The Order, at p 3 asserts that ASAP admitted that it met the PURA definition of "telecommunications utility." This misstates ASAP's position. ASAP never agreed it was a telecommunications utility. ASAP did agree that the definition itself described what ASAP did when it provided service to ISPs. ASAP, however, has consistently asserted it is not a telecommunications utility subject to state certification, registration or regulation since its activities are exempt because of federal law.

⁹⁶ *ISP Remand Order, supra* ¶¶ 49, 52.

⁹⁷ *Southwestern Bell Tel. Co v FCC*, 153 F.3d 523, 543 (8th Cir. 1998) [Although some traffic destined for information service providers (including ISPs) may be intrastate, the interstate and intrastate components cannot be reliably separated]

end communication that is within a state and those parts of the session that involve communication between two states.⁹⁸

The Commission's changes to the initial recommended findings in the Proposal for Decision do not save the ultimate finding. The PUC is still necessarily asserting regulatory power over a purely interstate activity, and the only way it can do so is by engaging in a facilities segregation approach. This is a resurrection of the "two-call" theory that the FCC has rejected in favor of the "end-to-end" analysis. When there is an interstate communication, all parts of that communication, and all of the services provided by all of the carriers to route and transmit that communication, are interstate. This must be the case. For example, when an ILEC end user calls an ISP served by a CLEC, all of the facilities between the end user, the ILEC, the CLEC and the ISP are very likely to be within the same local calling area. The end user, the ISP and all the carriers are in the same state.⁹⁹ Yet the FCC very clearly held in the *ISP Remand Order* that the ILEC and competitive carrier's jointly provided service between the end user and the Internet is a form of interstate access. This aspect of the FCC's rulings in the reciprocal compensation wars has never been reversed or even seriously challenged.

ISPs can choose to purchase service from an intrastate tariff. Alternatively, the ISP can choose to obtain service through an interstate offering.¹⁰⁰ It is possible to get a local number as part of an ILEC's interstate switched access FG A or BSA A tariff.¹⁰¹ The Order wrongly eliminates the choice given to ISPs to purchase either an interstate service or an intrastate service. ASAP has offered only an interstate service, and the ISPs have chosen to accept that service.¹⁰² The Order is inconsistent with the current law concerning the jurisdictional nature of the telecommunications services provided to ISPs and removes the choices made by ASAP's ISP customers to receive interstate, rather than intrastate, service.

⁹⁸ Memorandum Opinion and Order *In the Matter of GTE Telephone Operating Cos GTOC Tariff No. 1 GTOC Transmittal No 114*, CC Docket No. 98-79, FCC 98-292 ¶ 22 (Rel. Oct 1998) ("*GTE ADSL*"): "In a single Internet communication, an Internet user may, for example, access websites that reside on servers in various state or foreign countries, communicate directly with another Internet user, or chat on-line with a group of Internet users located in the same local exchange or in another country, and may do so either sequentially or simultaneously."

⁹⁹ The Commission continues to rely on the PFD finding that the ISP customers in are Texas. Order p. 5, citing PFD at 55.

¹⁰⁰ *ISP Remand Order* ¶ 55, *MTS/WATS Market Structure Order*, 97 FCC 2d at 711-12, 722; *Filing and Review of Open Network Architecture Plans*, CC Docket No 88-2, Memorandum Opinion and Order, 4 FCC Rd 1, 141 (1988), *aff'd*, *California v. FCC*, 4 F.3d 1505 (9th Cir. 1993).

¹⁰¹ ASAP Exh. 43 (Goldstein Reb.) p. 18; ASAP Exh. Exh. 44 (Gaetjen Reb.) p. 11. Calls to an interstate Feature Group A number are retail rated as local to the calling party; there is no charge, even if the called party (the subscriber to interstate switched access Feature Group A) is not physically present within the local calling area. This feature group incorporates expanded calling areas like ELCS and mandatory EAS. Interstate service providers therefore are allowed to use local numbering resources to provide interstate service. This is what ASAP does.

¹⁰² Since ASAP is not an ILEC, it is not required to have interstate tariffs.

The case law is absolutely clear that the FCC's statutory regulatory power over interstate communications "indicates an intent by Congress to occupy the field to the exclusion of state law."¹⁰³ "Interstate communications are totally entrusted to the FCC...The dividing line between the regulatory jurisdictions of the FCC and states depends on 'the nature of the communications with pass through the facilities [and not on] the physical location of the lines.'"¹⁰⁴ "It is beyond dispute that interstate telecommunications service is normally outside the reach of state commissions and within the exclusive jurisdiction of the FCC."¹⁰⁵ "The states do not have jurisdiction over interstate communications."¹⁰⁶ The FCC has preempted state statutes and state regulatory actions that attempted to intrude on the FCC's exclusive interstate authority.¹⁰⁷ Ordering Paragraph No. 4 expressly requires ASAP to register or cease providing service. This is beyond the Commission's power, since it cannot in any way prevent a carrier from providing a purely interstate service unless it subjects itself to state regulation.

ASAP agrees that registration itself is not particularly onerous.¹⁰⁸ The act of registration, however, necessarily subjects the registrant to PUC jurisdiction. This includes the Commission's ability to require reporting, specify billing formats, and require the registrant to cease doing business in the state under certain circumstances. It allows the Commission to resolve disputes between the carrier and its customers – presumably with an appeal to state court (rather than the FCC or a federal court) – and involves many other substantive duties and obligations. Registration may require ASAP to pay regulatory assessments imposed on intrastate nondominant carriers, based on ASAP's purely interstate service revenue. For example, ASAP does not at present know whether the revenues from the service it provides to ISPs is subject to the state USF or the federal USF. Any attempt to require ASAP to pay regulatory assessments to both jurisdictions and USF to both state and federal funds for the same service revenue will be confiscatory and unlawful. The Commission's assertion of jurisdiction over ASAP's interstate service exceeds the state's authority and violates federal law.

¹⁰³ See *Ivy Broadcasting v. AT&T*, 391 F.2d 486, 490 (2nd Cir. 1968). This exclusive jurisdiction is grounded in the Communications Act, as amended. 47 U.S.C. § 152(a) applies to "all interstate and foreign communication by wire or radio." The savings clause in § 152(b) is no help, because it reserves state jurisdiction only to "intrastate" communications.

¹⁰⁴ *NARUC v. FCC*, 746 F.2d 1492, 1498 (DC Cir. 1984) (and cases cited therein).

¹⁰⁵ *AT&T Communications v. Wyo. PSC*, 625 F.Supp. 1204, 1208 (USDC Wyo., 1985).

¹⁰⁶ *AT&T and the Associated Bell Sys. Cos. Interconnection with Specialized Carriers in Furnishing Interstate Foreign Exchange Service in Common Control Switching Arrangements (CCSA)*, 46 F.C.C.2nd 14, 20 (1975), *aff'd* *California v. FCC*, 567 F.2d 84 (D.C.Cir.1977) *cert. den.* 434 U.S. 1010

¹⁰⁷ *In the Matter of Operator Services Providers of America Petition for Expedited Declaratory Ruling*, FCC 91-185, 6 F.C.C.R. 4475 (Rel. Jul. 1991), Memorandum Opinion and Order, *Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth Corp.*, 7 F.C.C. Rcd 1619 (1992) ("MemoryCall").

¹⁰⁸ Order p. 5, n. 9.

Conclusion

The Commission failed to consider the most important questions: where is the harm and where does the public interest lie? Is CenturyTel harmed when it routes calls to ASAP via its meet-point within San Marcos and incurs no different cost than if it were to route to SBC or Verizon? Are the ISPs – which provide service in both rural and metropolitan areas – harmed when they are able to obtain PSTN connectivity for one-fourth of the price that CenturyTel charges and one-half of what SBC charges?¹⁰⁹ Are CenturyTel's end users harmed by being able to reach ASAP's ISP customers without paying toll? Where does the public interest lie?

ASAP provides a valuable competitive and public service to both its paging and ISP customers. ASAP directly competes with CenturyTel. Ultimately, that is CenturyTel's problem. But there is no harm to either CenturyTel or any other person as a result of ASAP's service provision. CenturyTel is absolutely cost and revenue indifferent to whether it sends a call to ASAP, SBC or Verizon. There is no damage done, other than to CenturyTel's unreasonable and illegal desire to extract money from its captive ratepayers or any competitor who makes the "mistake" of trying to enter CenturyTel's market.

If the Commission continues to rule that toll applies, then people will suffer. Competition will suffer. ISPs will have fewer options; their cost of providing service to rural areas like Fentress, Kyle and Lockhart will rise and this increased cost will be passed on to end users. CenturyTel and SBC (along with their affiliated ISPs) will rejoice. Those humble doctors and organ transplant waites – the public that this Commission is supposed to protect will suffer. Why? Because CenturyTel insists it is entitled to toll for any call that goes outside of San Marcos, unless the called party is served by CenturyTel, SBC or Verizon. This is not the law and it is not proper policy.

The Order violates both state and federal law in numerous respects. The Commission must grant rehearing and correct its errors. Otherwise the FCC or courts will be forced to step in and preserve end users' rights to dialing parity and ASAP's federal interconnection and numbering resources rights.

WHEREFORE, PREMISES CONSIDERED, ASAP PAGING INC. respectfully requests that the Commission grant this Motion for Rehearing and make the changes that are required to conform to law and the public interest.

¹⁰⁹ ASAP Exh. 43 (Goldstein Reb) p 20 Perhaps we have discovered one of the sources of CenturyTel's displeasure with ASAP and the motivation for its actions Why respond to price competition when you can instead use your ability to dissuade your captive base of end users from calling an ISP served by a competitor by imposing a tax on them whenever they call? An ISP who gets no calls will quickly abandon the fledgling competitor

Respectfully Submitted,

ASAP PAGING, INC.

W. Scott McCollough

Texas State Bar No. 13434100

e-mail: wsmc@aus.scmplaw.com

David Bolduc

Texas State Bar No. 02570500

e-mail: dbolduc@aus.scmplaw.com

STUMPF CRADDOCK MASSEY & PULMAN

1250 Capital of Texas Highway South

Building One, Suite 420

Austin, Texas 78746

512/485-7920

512/485-7921 FAX

By: _____

W. Scott McCollough

Certificate of Service

The undersigned certifies that a copy of the foregoing instrument was served upon the attorneys of record below to the above-styled cause, on this 30th day of October, 2003 and in compliance with P.U.C. Proc. R. § 22.328

Brook Bennet Brown
McGinnis, Lockridge & Kilgore
919 Congress Avenue, Suite 1300
Austin, Texas 78701
(512) 495-6000 (Voice)
(512) 495-6093 (FAX)

Mr. Roger Stewart
Legal Division
Public Utility Commission of Texas
1701 N. Congress Ave., Rm. 8-110
Austin, Texas 78701

Thomas H. Walston
Administrative Law Judge
State Office of Administrative Hearings
William P. Clements Bldg.
300 W. 15th St., Suite 502
Austin, Texas 78711-3025

W. Scott McCollough

ASAP Paging, Inc. Petition for Preemption of TPUC

**Exhibit 7: CenturyTel Refusal to Locally Retail Rate Calls to ASAP's Kyle
Switch**



Control Number: 25673



Item Number: 167

Addendum StartPage: 0

LAW OFFICES
MCGINNIS, LOCHRIDGE & KILGORE, L.L.C. 0000000

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FAX COVER SHEET

FROM: Brook Bennett Brown

DIRECT DIAL: (512) 495-6023

DATE: October 29, 2003

PAGES SENT: 7
(INCL. THIS PAGE)

Re: SOAH Docket No. 473-02-2503; PUC Docket 25673 - *Complaint of ASAP Paging, Inc. and San Marcos Internet, Inc. Against CenturyTel of San Marcos, Inc.*

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COMMENTS:

TO:	FAX NUMBER	PHONE NUMBER
Scott McCollough	485-7921	485-7920
Roger Stewart	936-7268	936-7296
Consumer Protection Division	936-7003	936-7145

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OCT 30 2003

CUSTOMER PROTECTION

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WRITER'S DIRECT DIAL NUMBER:
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bbrown@mcginnislaw.com
Fax: (512) 505-6323

October 29, 2003

Mr. Scott McCollough
Stumpf Craddock Massey & Pulman
1250 Capital of Texas Highway South
Building One, Suite 420
Austin, Texas 78746

VIA TELECOPY
(512) 485-7921

Re: *Docket 25673; Complaint of ASAP Paging, Inc. and San Marcos Internet, Inc. Against CenturyTel of San Marcos, Inc.*

Dear Mr. McCollough:

John Navarrette, Operations Manager of CenturyTel of San Marcos, Inc., has received the attached fax from Ted Gaetjen of ASAP Paging, Inc., on Oct. 28, 2003, addressing the 512/580 Kyle NPA/NXX. In this letter, Mr. Gaetjen states that he expects calls to the 512/580 NPA/NXX to continue to be routed as ELC from the CenturyTel San Marcos exchange, based on his statement that ASAP now has a switch in Kyle.

In order for paging calls to be completed to ASAP's 512/580 NPA/NXX, it will be necessary for ASAP to enter into an interconnection agreement with CenturyTel. That agreement will determine the routing and appropriate terms of interconnection for such traffic. Absent an interconnection agreement, calls to this NPA/NXX will be treated as 1+/0+, consistent with the Commission's order in Docket 25673.

Also, it appears that ASAP is continuing to assign numbers from the 512/580 NPA/NXX to internet service providers. The attached print-out of the dial-up numbers listed for San Marcos Internet ("SMI"), printed yesterday, shows use of the 512/580-2000 number for SMI's dial-up internet access. The Commission's order in Docket 25673 concludes that ISP-bound traffic is not "CMRS" traffic or incidental to such traffic. There is no interconnection agreement between ASAP and CenturyTel for the completion of this ISP-bound traffic as local or ELCS traffic. For this reason, CenturyTel will require calls to this NPA/NXX to be treated as 1+/0+ in the absence of a valid interconnection agreement.

Should ASAP desire to enter into an interconnection agreement with CenturyTel, Susan Smith, Director - External Affairs for CenturyTel, is the proper contact. Her telephone number is 903-792-3499. Her e-mail address is susan.smith@centurytel.com. Her mailing address is CenturyTel, 911 North Bishop Road, Suite C-207, Texarkana, Texas 75501.

Mr. Scott McCollough
October 29, 2003
Page 2

Mr. Gaetjen's letter did not mention the 512/384 or 512/265 NPA/NXXs. I assume that you have informed Mr. Gaetjen that calls to these numbers, in addition to the 512/580 NPA/NXX, will be routed as 1+/0+ beginning Nov. 1 at 12:01 a.m. Numbers from these NPA/NXX blocks continue to be shown as dial-up internet access numbers by SML.

Mr. Gaetjen's letter was sent to Mr. Navarrette. I have not copied Mr. Gaetjen with this reply, as I assume that you continue to represent Mr. Gaetjen in this matter and that you will notify him of it. If you no longer represent Mr. Gaetjen, please let me know immediately so that I may forward this letter to Mr. Gaetjen directly.

Please contact me if you have any questions regarding this letter.

Very truly yours,


Brook Bennett Brown

BBB

Attachment

cc: Mr. Roger Stewart, Legal Division, PUC
Consumer Protection Division, PUC

10-28-2003 11:23

512 754 5614

CENTURYTEL OF SAN MARCOS, INC.

P.02

ASAP PAGING INC.**RECEIVED**

OCT 28 2003

CenturyTel

208 N. TEXANA
P.O. BOX 607
HALLETTTSVILLE, TEX 77964
PH 361.798.4943
FAX 361.798.3636

7700 NORTH LAMAR
AUSTIN, TEXAS 78752

PH 512.458.2727
FAX 512.451.7198

October 27, 2003

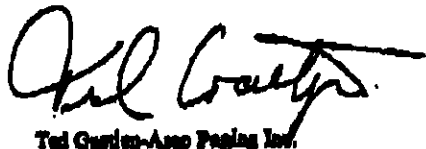
CENTURYTEL of San Marcos, Inc.
Attn: John Navarrette
208 South Gundakips
PO Box 628
San Marcos, TX 78667

Mr. Navarrette,

Please be advised that Asap Paging Inc. has installed a switch in Kyle, Texas. This switch is connected to to Varigone's and office in Kyle, Texas. The LERG reflects the "geographic" location of the switch that complies with the recent Texas PUC ruling.

Asap Paging Inc. expects the 512.980.XXXX (Kyle) NOKX to continue to be routed as SLC from Centurytel Customers in San Marcos to our facilities in Kyle, Texas.

Thank you for you help in insuring there is no disruption in service.



Ted Gaudin-Asap Paging Inc.

CC: Roger Stewart, Legal Division, PUC
Centurytel, Monroe, LA



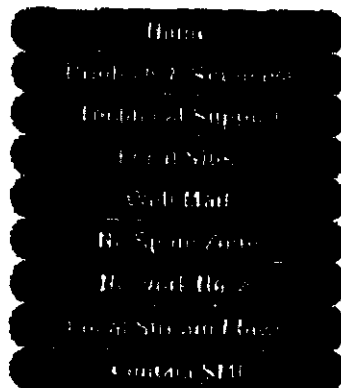
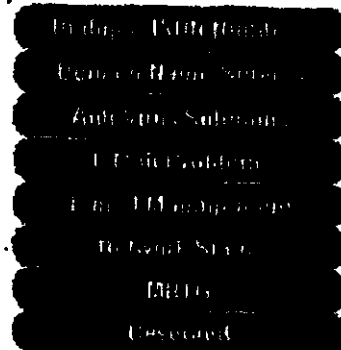
Tuesday, October 28, 2003

Web Index Tech Support **Recent News** Contact Us

56K modem & ISDN Numbers

New Phone Numbers

SMI has added the Dripping Springs calling area with 270-2000. The bold listings indicate home cities for the available calling areas. A cross-reference table is also provided to locate the home cities.



Adamsville	354-2000
Austin	202-2000
Barlett	387-2000
Bastrop	256-2000, 679-2000
Baton	387-2000
Bertram	387-2000
Briggs	387-2000
Bryan	520-2000
Buchanan Dam	980-2000
Buckholts	387-2000
→ Buda	560-2000, 285-2000
Burnett	387-2000
Caldwell	520-2000
Cameron	520-2000
College Station	520-2000
Copperas Cove	387-2000, 354-2000
Coupland	348-2000
→ Dale	384-2000, 285-2000, 256-2000
Dripping Springs	270-2000
Elgin	679-2000
→ Fentress	256-2000, 384-2000, 580-2000
Florence	348-2000, 387-2000
Fort Hood	387-2000
Gatesville	354-2000
Georgetown	348-2000
Giddings	679-2000
Granger	387-2000
Granite Shoals	980-2000
Hamilton	354-2000
Heame	520-2000
Heidenheimer	387-2000
Holland	387-2000
Hutto	387-2000
Jarrell	387-2000, 348-2000, 645-2000

Kempner	354-2000
Kileen	387-2000, 354-2000
Kingsland	271-2000
→ Kyle	580-2000, 265-2000
Lampasas	298-2000
Lexington	879-2000
Liberty Hill	387-2000
Little River	387-2000
Llano	980-2000
→ Lockhart	384-2000, 265-2000
Luling	296-2000
→ Lyton Springs	384-2000, 265-2000, 266-2000
Marble Falls	980-2000
→ Martindale	265-2000, 878-1234
→ Maxwell	265-2000, 878-1234
McDade	256-2000, 679-2000
Milano	520-2000
Paige	879-2000, 256-2000, 682-2000
→ Reedville	265-2000, 878-1234
Rockdale	387-2000, 520-2000
Rocky Creek	258-2000
Rodgers	387-2000
Salado	387-2000
San Gabriel	387-2000
San Marcos	878-1234, 393-5301
Smithville	582-2000, 679-2000
→ Staples	265-2000, 878-1234
Taylor	648-2000, 387-2000
Temple	387-2000, 520-2000
Thorndale	387-2000
Tow	271-2000, 980-2000
Wimberley	698-2000

Home City Cross Reference

202-2000	Austin
258-2000	Bastrop
→ 265-2000	Fentress
270-2000	Dripping Springs
271-2000	Burnett
298-2000	Lampasas
348-2000	Georgetown
354-2000	Adamsville
→ 384-2000	Lockhart
387-2000	Jarrell
393-5301	San Marcos
520-2000	Milano

Last Updated January 02, 2003

→ 580-2000	Kyle
582-2000	Smithville
645-2000	Taylor
679-2000	Paige
688-2000	Wimberley
678-1234	San Marcos
980-2000	Buchanan Dam

Verify the number is a local call by using a standard phone to dial the number. You should hear a high pitched continuous tone if you reached the modeems. Otherwise, you may hear a message indicating you must dial a "1" before the number which would be a long distance call creating charges on your phone bill. Do not use the number if this is the case, but please send a message to support@comidor.net telling us your phone number and that the number is not a local call. If you need assistance please call Tech Support at 512-393-5300 or 1-888-297-3822.

Important Note: SMI is not responsible for long distance charges on your phone bill as a result of dialing our service. It is the responsibility of the user to verify the access number is a local call and the configuration of the dialup software is correct.

ASAP Paging, Inc. Petition for Preemption of TPUC

**Exhibit 8: TPUC Project No. 18438, Texas Number Conservation Task
Force Report**



Control Number: 18438



Item Number: 4

Addendum StartPage: 6

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PROJECT 18438

**TEXAS NUMBER CONSERVATION TASK FORCE
REPORT**

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 - B. Number Pooling**
 - C. "Transparent Overlay"**
 - D. Other Number Conservation Methods**
 - E. Test Codes, Special Codes, Protected Codes, etc.**
- IV. Analysis of Options**
- V. Recommendations**
- VI Participant Comments**
- VII Glossary Of Terms**